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No. 95-180

In The

Supreme Court of the United States

October Term, 1995

THE LAWRENCE PAPER COMPANY,

Petitioner,

v.

GEORGE R. GOMEZ, Workers Compensation Director of the State of Kansas and THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Kan. Stat. Ann. 44-511(a)(2)(E), which provides that the value of discontinued employer-paid insurance and employer contributions to pension and profit-sharing plans should be included with other forms of compensation received by employees in the statutory definition of "wages" used to compute workers compensation benefits, is preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1988).

LIST OF PARTIES

Petitioner: The Lawrence Paper Company

Respondents: George R. Gomez, Workers Compensation Director for the State of Kansas

The State of Kansas

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BRIEF IN OPPOSITION

The Respondents, George R. Gomez and the State of Kansas, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Kansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Kansas Supreme Court sought to be reviewed by Petitioner is correctly set forth in Petitioner's Appendix A. Petitioner correctly attaches the opinions and describes the procedural history of the case.

STATUTORY PROVISIONS INVOLVED

Federal statutes relevant to this matter are 29 U.S.C. § 1144(a), which states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

and 29 U.S.C. § 1003(b)(3), which provides:

> (b) The provisions of this subchapter shall not apply to any employee benefit plan if –
>
> . . . .
>
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

The Kansas statutes involved are K.S.A. 44-511(a)(2) and (3):

> 44-511. Average gross weekly wage computation; average yearly wage; state's average weekly wage. (a) As used in this section:
>
> . . . .
>
> (2) The term "additional compensation" shall include and mean only the following: . . . and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by

the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

STATEMENT OF THE CASE

Under the Kansas Workers Compensation Act ("KWCA"), an injured employee ordinarily is entitled to receive benefits based upon a percentage of the employee's average weekly wage. The value of discontinued employer-paid life insurance, health and accident insurance and employer contributions to pension and profit-sharing plans is encompassed in the average weekly wage calculation. Specifically, the term "wage" is defined to mean an employee's salary or hourly pay, plus "additional compensation." K.S.A. 44-511(a)(3). "Additional compensation", in turn, is defined to include such items as gratuities, cash bonuses, employer-provided room and board and the value of "employer-paid life insurance, health and accident insurance and employer

contributions to pension and profit sharing plans . . . ," if such remuneration is discontinued. K.S.A. 44-511(a)(2)(E).

K.S.A. 44-511(a)(2)(E) was enacted in 1974 and, with the exception of a technical amendment in 1977, has remained unchanged since that time. This statutory provision is directed solely toward determining benefits to be paid injured workers under the KWCA. Neither the challenged statute nor any other provision of the KWCA requires an employer to establish or maintain an ERISA-covered employee benefit plan or its equivalent – regardless of whether an employee is receiving workers compensation benefits. Similarly, the KWCA does not prevent employers from amending, modifying or terminating an ERISA-covered employee benefit plan. The KWCA is completely silent on either the type or amount of an employer's contributions to, or the benefits to be paid by, an ERISA-covered employee benefit plan. Finally, the KWCA does not establish any terms, rules or regulations under which an ERISA-covered employee benefit plan must operate.

Petitioner's workers compensation plan is maintained and administered separately from its ERISA-covered plans. The only link between Petitioner's ERISA-covered benefit plans and its workers compensation plan is economic, in that any increase or decrease in employer-paid ERISA fringe benefits can potentially affect Petitioner's workers compensation liability. The converse relationship, however, does not exist. That is, a change in workers compensation benefit levels has no effect on Petitioner's liability for ERISA-covered fringe benefits.

Petitioner's personnel director who is responsible for administration of Petitioner's workers compensation plan, as well as its ERISA-covered employee benefit plans, testified below he was unaware of a single instance where there had been a recomputation of an employee's wages to take into account the value of discontinued ERISA-plan benefits.

REASONS FOR DENYING THE WRIT OF CERTIORARI

ARGUMENT

A. THE KANSAS SUPREME COURT CONSIDERED AND CORRECTLY APPLIED *GREATER WASHINGTON BOARD OF TRADE* AND *BLUE CROSS*. AS THE CHALLENGED KANSAS LAW DIFFERS MATERIALLY FROM THE DISTRICT OF COLUMBIA LAW AT ISSUE IN *GREATER WASHINGTON BOARD OF TRADE* AND HAS ONLY A "TENUOUS, REMOTE OR PERIPHERAL" RELATIONSHIP TO ERISA PLANS, THIS COURT'S DECISIONS DO NOT WARRANT A FINDING THAT THE KANSAS LAW IS PREEMPTED BY ERISA.

The ERISA preemption provision invoked by Petitioner and applied by the Kansas Supreme Court in this case states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan

> described in section 1003(a) or this title and now exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). Employee benefit plans described in section 1003(a) and subject to ERISA coverage are: employee welfare benefit plans and employee pension benefit plans. 29 U.S.C. § 1002(3).

As this Court observed in *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. ___, 113 S. Ct. 580 (1992):

> Among the plans exempt from ERISA coverage under § 4b are those 'maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation laws or unemployment compensation or disability laws.' § 4(b)(3), 29 U.S.C. § 1003(b).

113 S. Ct. at 582.

The congressional purpose in enacting the preemption provision was:

> 'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.' *Ingersoll-Rand Company v. McClendon*, 498 U.S. at 142 (1990).

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. ___, 115 S. Ct. 1671, 1677 (1995).

Respondents acknowledge that ERISA preemption is intended to prevent states and their subdivisions from taking actions that directly or indirectly regulate ERISA-covered employee benefit plans or that have more than a "remote, tenuous or peripheral" connection to covered plans. Respondents also acknowledge that – notwithstanding the ERISA exemption accorded state workers compensation laws – the Kansas law would be subject to preemption if it directly or indirectly regulated or affected ERISA-covered benefit plans or had more than a "remote, tenuous or peripheral" connection to such plans. In this case, however, the challenged provision of the KWCA imposes no legal or regulatory burden on ERISA-covered employee benefit plans. It creates no "conflicting directives" for ERISA plan administrators or otherwise interferes with the establishment or maintenance of a uniform federal ERISA regulatory scheme. No ERISA policy would be advanced and no congressional concern alleviated by preemption of the Kansas statute. To the contrary, the position advocated by Petitioner runs squarely counter to express congressional intent to exempt state workers compensation laws from ERISA preemption.

The preemptive sweep of ERISA, although broad, is not unlimited. As explained in *Combined Mgt. v. Superintendent of Bur. of Ins.*, 22 F.3d 1 (1st Cir. 1994): "Congress explicitly exempted state workers' compensation schemes from ERISA's purview, . . . leaving intact the states' traditional regulation and oversight of this specialized system of insurance." *Id.* at 4. *See also Hook v. Morrison Milling Co.*, 38 F.3d 776, 786 (5th Cir. 1994) (" '[A] preemption provision designed to prevent state interference with

federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction. . . .' ERISA was not meant to consume everything in its path."). Moreover, this Court has consistently held that "[p]reemption does not occur . . . if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans." *Greater Washington Board of Trade*, 506 U.S. ___, 113 S. Ct. at 583 n.1.

Petitioner argues the Kansas Supreme Court's decision is inconsistent with *Greater Washington Board of Trade*, and, consequently, preemption of the Kansas statute is required. Petitioner's argument, however, does not account for the significant distinction between the District of Columbia law considered in *Greater Washington Board of Trade* and the KWCA provision at issue here. It does not reflect this Court's working " 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Blue Cross*, 514 U.S. ___, 115 S. Ct. at 1676 (citation omitted).

The District of Columbia law preempted by *Greater Washington Board of Trade* required employers who furnished health insurance coverage for employees to continue to furnish equivalent insurance to injured employees receiving workers compensation benefits. Specifically, it stated:

> Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to

> receive workers' compensation benefits under this chapter.

D.C. Code Ann. § 36-307(a-1)(1) (1992). As noted by the Kansas Supreme Court, the practical effect of the District of Columbia law was to prevent an employer from discontinuing ERISA-covered health insurance coverage for employees receiving workers compensation benefits once an ERISA plan had been established. (Petitioner's App., A11). The KWCA imposes no such mandate. The Kansas law merely looks to the value of ERISA benefits, if discontinued, as one factor to be included in the definition of "wages" used to compute workers compensation benefit levels. As a result, there is a significant factual distinction in the degree of relationship or connection between ERISA plans and the Kansas and District of Columbia laws.

The difference can be illustrated by comparing employer mandates under the two statutory provisions. Under the District of Columbia law, an employer who established an ERISA-covered health insurance plan was not free to terminate it and provide no equivalent health insurance coverage. Under the same circumstances, a Kansas employer is free to terminate an ERISA-covered health plan and has no obligation to provide an equivalent plan or coverage.

As explained by the Kansas Supreme Court:

> [T]he District of Columbia law did more than merely attach a dollar value to a fringe benefit and include a percentage of that value in computing workers compensation benefits. The District of Columbia law essentially mandated the continuation of ERISA-covered benefit plans.

(A11). Contrary to Petitioner's claim, the Kansas statute is fundamentally different from that considered in *Greater Washington Board of Trade*. As a result, neither *Greater Washington Board of Trade* nor any other decision of this Court requires a finding of preemption in this case.

B. THE KANSAS SUPREME COURT'S CONCLUSION THAT MERE GENERIC MENTION OF AN ERISA PLAN OR BENEFITS IN A STATE STATUTE DOES NOT REQUIRE PREEMPTION IS FULLY SUPPORTED BY DECISIONS OF THIS COURT, INCLUDING *GREATER WASHINGTON BOARD OF TRADE* AND *BLUE CROSS*.

Both the Kansas Supreme Court and Petitioner observe that the Kansas approach is not unique in state workers compensation systems but rather is shared by a number of states. (A6; Petition for Cert., p. 14). Quoting statutes from Missouri and Montana, Petitioner also points out that other states stand in "stark contrast" to Kansas and have expressly excluded fringe benefits furnished by employers:

> *See, e.g.*, Mo. Rev. Stat. Section 287.250.2 (1993 Cum. Supp.) (term "wages" does not include fringe benefits such as retirement, pension, health and welfare, life insurance or "other employee or dependent benefit plan furnished by the employer for the benefit of the employee").

(Petition for Cert., p. 15). Similarly, the Montana statute provides that "wages do not include . . . (d) contributions made by the employer to a group insurance or pension plan." Mont. Code Ann. § 39-71-123(2) (1993). That states

have chosen to structure their workers compensation systems in differing ways, however, lends no comfort to Petitioner's preemption claim. Rather, such differences were expressly contemplated by Congress when enacting ERISA's exemption and preemption provisions. ERISA preemption was intended to ensure that ERISA plans would be governed by a uniform body of ERISA law and regulation; it was not intended to create a national system of uniform state workers compensation systems.

Plaintiff urges this Court to conclude that the mere generic reference to fringe benefits provided under a plan that is subject to ERISA coverage dictates preemption without consideration of either the actual effect, if any, of the state law on ERISA-covered plans, or the underlying federal policies sought to be effectuated by ERISA preemption. The obvious error of this argument is demonstrated by the very language of the Missouri and Montana statutes quoted favorably by Petitioner as examples of state laws that do not run afoul of ERISA preemption. Petitioner ignores that the two state statutes, like the Kansas law, refer generically to benefits provided under employee benefit plans covered by ERISA.

On its face Petitioner's "mere mention" theory produces an incongruous result, frustrating state efforts to shape workers compensation laws in ways that are not violative of ERISA and consigning ERISA benefits to a statutory black hole. Under the "mere mention" theory of preemption, if a state statute were specifically to include the value of discontinued ERISA benefits in the wage base used to compute workers compensation benefits, the

statute would be preempted. Conversely, if the state statute were specifically to exclude the value of such discontinued benefits from the wage base, it would be similarly preempted.

Petitioner's argument simply lacks logic or wisdom. Certainly, it flies in the face of common sense to conclude that Congress, which excluded workers compensation plans and statutes from ERISA preemption, intended to leave states incapable of addressing how employee benefits should be treated in their state workers compensation laws. Obviously, something more than the mere mention of an ERISA plan or plan benefits in a workers compensation statute is necessary to invoke preemption. The statute must have some tangible legal or administrative impact, albeit direct or indirect, on an ERISA plan. And, as explained in *Greater Washington Board of Trade* and other preemption cases decided by this Court, the impact must be more than "tenuous, remote or peripheral." *Greater Washington Board of Trade*, 506 U.S. ___, 113 S. Ct. 580, 583 n.1.

Relying on this Court's holdings in *Greater Washington Board of Trade* and *Blue Cross*, the Kansas Supreme Court properly reasoned that it must " 'go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.' " (A17, quoting *Blue Cross*, 514 U.S. ___, 115 S. Ct. at 1677). Based upon this Court's articulation of congressional purpose in *Blue Cross* and an extensive review of federal appellate decisions post-dating *Greater Washington Board of Trade*, the Kansas Supreme Court concluded: (a) the mere listing of

ERISA benefits "as one factor to be included in a broader calculation is 'in and of itself' inconsequential for § 514(a) purposes" and (b) "ERISA preemption does not arise merely because of a state law that increases a company's cost of doing business in a way that could be alleviated by ERISA preemption." (A15) (citations omitted).

Support for the Kansas Supreme Court's decision may also be found in the distinction between state laws that affect ERISA plans and those, like the Kansas statute, that focus instead on ERISA benefits. The significance of this distinction is explained in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987):

> It is thus clear that ERISA's preemptive provision was prompted by recognition that employers establishing and maintaining employee benefits plans are faced with the task of coordinating complex administrative activities. . . . Preemption insures that the administrative practices of a benefit plan will be governed by only a single set of regulations. . . . It is for that reason the Congress preempted state laws relating to plans, rather than simply to benefits.

Id. at 11.

Clearly, as determined by the Kansas Supreme Court, the purposes of ERISA preemption are not in any way thwarted or undermined by the KWCA. The KWCA imposes no burden on the interests of employees or their beneficiaries under ERISA-covered plans. Similarly, it imposes no substantive requirements or administrative burdens on ERISA plans or their administrators, nor does it in any way affect the uniformity of federal ERISA law.

C. THE KANSAS SUPREME COURT CORRECTLY INTERPRETED AND APPLIED *BLUE CROSS* IN CONCLUDING PREEMPTION IS NOT REQUIRED WHERE THE KANSAS STATUTE IMPOSES NO LEGAL, STRUCTURAL CONTRIBUTION OR BENEFIT REQUIREMENTS ON ERISA PLANS AND WHERE ITS ONLY RELATIONSHIP WITH ERISA PLANS IS ECONOMIC.

In its opinion, the Kansas Supreme Court points out that Petitioner has alleged no direct administrative connection between the KWCA and any ERISA-covered employee benefit plan and that the only asserted link is economic, in that an increase in employer-paid ERISA fringe benefits may result in an increase in potential liability under the KWCA. (A7). As previously noted, however, the converse relationship does not exist. The KWCA imposes no contribution or benefit obligations on an ERISA-covered plan or plan administrators. An increase in workers compensation benefits under the KWCA requires no change at all in ERISA plan terms or benefits.

Unlike the New Jersey workers compensation law that prevented ERISA plans from setting off workers compensation benefits against ERISA-covered retirement benefits or pensions; the New York "Human Rights Law" that prohibited employers from structuring employee benefit plans in a manner that discriminated on the basis of pregnancy; or the Pennsylvania law that prohibited "plans from . . . requiring reimbursement [from the beneficiary] in the event of recovery from a third party" – all of which were considered by this Court and held to be preempted in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S.

504 (1981), *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) and *FMC Corporation v. Holliday*, 498 U.S. 52 (1990) – the KWCA imposes no requirements relating to employee benefit levels, structures or administration. Although the KWCA may affect an employer's overall cost of doing business, it imposes no costs or other obligations on an ERISA plan itself.

Acknowledging a state law "might produce such acute, albeit indirect, economic effects . . . as to force an ERISA plan to adopt a certain scheme of substantive coverage" (115 S. Ct. 1683) – a condition clearly not present in this case – this Court specifically concluded in *Blue Cross* "that a law operating as an indirect source of merely economic influence on administrative decisions . . . should not suffice to trigger preemption. . . . " *Blue Cross*, 514 U. S. ___, 115 S. Ct. at 1680. Accordingly, the KWCA provision challenged by Petitioner is not subject to ERISA preemption on the basis of the indirect economic influence the KWCA may have on ERISA benefit plans.

D. THE KWCA TREATS ERISA BENEFITS NEUTRALLY IN CALCULATING WORKERS COMPENSATION BENEFIT LEVELS AND, CONTRARY TO PETITIONER'S ASSERTION, NEITHER FAVORS NOR DISFAVORS EMPLOYERS WHO PROVIDE ERISA BENEFIT PLANS

The KWCA does not distinguish between remuneration paid in money and the value of discontinued fringe benefits in the definition of "wages" used to calculate workers compensation benefits. The neutral treatment afforded discontinued fringe benefits and cash wages

under the KWCA was illustrated in the Kansas Supreme Court's opinion:

> If an employee has been paid a weekly cash wage of $100, but receives no other benefits, the employee's "wage" for the purpose of determining workers compensation payment levels under the KWCA is $100. Similarly, under the KWCA, if an employee has received weekly compensation of $100 composed of $80 cash and discontinued ERISA benefits having a value of $20, the employee's "wage" is again $100. LPC [Petitioner], however, urges that the $20 compensation attributable to discontinued ERISA benefits be ignored.

(A11). The illogic of Petitioner's argument is best illustrated if its application is taken to the logical end. Assume an employee's wages were composed entirely of employer paid accident, health, life insurance and employer contributions to pension and profit sharing plans and that the value of such benefits was $100. The employee receives no cash wages. If the employee were injured and the enumerated fringe benefits were discontinued, the employee would receive no workers compensation benefits at all under the scenario advanced by Petitioner. The effect would be two-fold: (1) ERISA benefits would be afforded special treatment *vis-a-vis* other forms of compensation and (2) injured workers would be deprived of workers compensation benefits based upon their full preinjury level of compensation.

Neither result is dictated by ERISA. Relying on this Court's decision in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988), the Third Circuit specifically

counseled against the special treatment of ERISA benefits sought by Petitioner:

> We do not believe ERISA requires a state to ignore the existence of ERISA benefits when considering overall remuneration to workers. . . . Indeed, *Mackey* suggests that a law would be preempted if it counted all remuneration to workers except benefits from ERISA plans, for this would be special treatment.

Keystone Chapter, Assoc. Builders v. Foley, 37 F.3d 945 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995).

E. PETITIONER FAILS TO IDENTIFY ANY CONFLICT OR CONFUSION IN LOWER FEDERAL COURTS OR STATE COURTS REGARDING ERISA PREEMPTION OF STATE WORKERS COMPENSATION SCHEMES.

Petitioner asserts "there is considerable uncertainty and disagreement in the lower federal and state courts regarding the scope of ERISA preemption with respect to workers compensation schemes in general." (Pet. for Cert., p. 15). In support of this proposition, Petitioner cites no state court opinions and four federal court of appeals decisions – none of which relate to state workers compensation laws and all of which are consistent with this Court's holdings in *Greater Washington Board of Trade* and *Blue Cross*, and with the decision of the Kansas Supreme Court in this case. In three of the four court of appeals' decisions, the courts determined that the state laws at issue were not preempted.

Keystone Chapter, 37 F.3d 945 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995), addressed the Pennsylvania

Prevailing Wage Act and found that it was not preempted even though some of the benefits counted in the prevailing wage calculation could include ERISA plan benefits. The *Keystone* court acknowledged that the Pennsylvania law would impose additional costs of that state's public works contractors, and like any other cost imposed on any employer, might "influence its choices regarding ERISA benefits contributions." 37 F.3d at 959. The court pointed out, however, that this impact "may be said of any wage regulation." *Id.* Noting that wage laws fall traditionally within the sphere of the state's police power, *Keystone* explains:

> ERISA's preemption clause aims "to ensure benefit plans will be governed by only a single set of regulations," not to bestow on employers a uniform regulatory and economic environment for all their activities across the country. Because states enact their own wage and non-ERISA benefits regulations . . . employers must adjust their operations according to locale. This administrative and financial burden arises from the "patchwork scheme" of our federal system, a system whose "separate sphere of governmental authority" were not preempted by ERISA.

Id. at 960 (citations omitted).

Minnesota Chapter of Assoc. Builders v. Dept. of Labor, 47 F.3d 975 (8th Cir. 1995), similarly concluded that the Minnesota prevailing wage law was not preempted by ERISA. The Eighth Circuit identified a number of factors to be considered in determining whether a state law is preempted because it "relates to" ERISA plans. They include whether the law:

> (1) negates an ERISA plan provision; (2) affects relations between primary ERISA entities; (3) changes the structure of ERISA plans; (4) affects ERISA plan administration; (5) affects ERISA plans economically; (6) exercises traditional state power; and (7) may be preempted consistent with other ERISA provisions.

Id. at 978. Like the Kansas Supreme Court and in accord with *Keystone*, the Eighth Circuit explained: "These factors must be assessed in light of the totality of the state statute's impact on the plan." *Id.*

Finally, *Guidry v. Sheet Metal Workers National Pension Fund*, 39 F.3d 1078 (10th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1691 (1995), determined that ERISA did not preempt a Colorado statute which exempted from garnishment 75% of disposable earnings, including compensation denominated as "avails of any pension or retirement benefits, or deferred compensation plan, avails of health, accident or disability insurance, or otherwise." *Id.* at 1085 (citation omitted). The Tenth Circuit acknowledged the Colorado law made generic reference to benefits attributable to ERISA-covered plans, but pointed out that, unlike the Georgia law considered in *Mackey* and found to be preempted, it made no specific reference to ERISA benefits or ERISA plans.

Simas v. Quaker Fabric Corporation of Fall River, 6 F.3d 849 (1st Cir. 1993) is the only federal courts of appeals case cited by Petitioner where a state statute was determined to be preempted by ERISA. It is readily apparent that *Simas* in no way conflicts with *Keystone, Minnesota, Guidry* or the state court decision in this case. *Simas* involved a Massachusetts state "tin parachute" law that

required employers to made substantial severance payments to employees who lost their jobs following corporate takeovers. The court found the directive to pay prescribed severance benefits constituted an employee benefit plan covered by ERISA.[1] Not surprisingly, *Simas* concluded a state statute cannot mandate benefits if they comprise an "employee benefit plan, no matter how virtuous the statute." *Id.* at 856. Because the Massachusetts law imposed such a plan, it was preempted.

In short, *Simas* reached a preemption conclusion different from the other decisions cited by Petitioner because it dealt with a state-imposed severance plan and because it considered a statutory scheme that differed materially from the state laws at issue in those cases. Certainly, there can be no plausible suggestion that the method of calculating workers compensation benefits under the KWCA constitutes establishment of an ERISA employee benefit plan so as to fall within the preemptive analysis of *Simas*.

Petitioner's assertions of "confusion and difficulty" in the lower federal courts and state courts in ascertaining the scope of ERISA preemption in workers compensation matters do not withstand scrutiny. Any confusion attendant to the issue is that of Petitioner and not of the

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[1] This is not a novel or startling finding, nor does it reflect conflict and confusion among lower federal courts, since courts have generally recognized that severance pay plans are employee benefit plans squarely falling within the provisions of ERISA. *See, e.g., Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985), *aff'd*, 477 U.S. 901 (1986).

courts. Respondents respectfully suggest that Petitioner's reliance on alleged judicial confusion as a basis for its Petition for Writ of Certiorari is misplaced.

CONCLUSION

For the foregoing reasons, Respondents submit Petitioner's request for summary reversal is wholly unwarranted and pray that the Petition for Writ of Certiorari be denied in all respects.

Respectfully submitted,

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